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No. 80-1576

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

PRINCETON UNIVERSITY & STATE OF NEW JERSEY,
Appellants

v.

CHRIS SCHMID,
Appellee.

On Appeal from the
Supreme Court of New Jersey

MOTION TO DISMISS APPELLANT'S APPEAL OR AFFIRM THE DECISION OF THE COURT BELOW

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I. QUESTIONS PRESENTED

A. Whether a private party has the right to appeal the overturning of a state criminal conviction absent the filing of an appeal by the State.

B. Whether a State has the right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.

Appellee in the above entitled case moves to dismiss the appeal or summarily affirm the opinion of the court below based upon the following:

I. STATEMENT OF THE CASE

As Princeton notes, Princeton Brief, p. 5, the facts of this case were stipulated by the parties. See especially the opinion of Judge Carchman, Princeton Brief, pp. 49a-59a. Appellee Schmid was arrested while passing out political literature in a peaceful manner on the grounds of Princeton University. There was no allegation of disorderliness on appellant's part, and the case presents a pure test of the right of a private residential university to freeze out the presentation of alien ideas to its student body by strangers. The New Jersey Supreme Court, in *State vs. Schmid*, 84, N.J. 535, 423 A.2d 615 (1980), unanimously construed the New Jersey Constitution to deny such a right, thereby voiding the conviction of Appellee for trespass in the courts below.

II. QUESTIONS PRESENTED

A. Whether a private party has the right to appeal the overturning of a state criminal conviction absent the filing of an appeal by the State.

B. Whether a State has the right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.

III. ARGUMENT

A. PRINCETON UNIVERSITY IS WITHOUT STANDING TO INVOKE THIS COURT'S JURISDICTION

Appellant Princeton University ("Princeton") correctly cites 28 U.S.C.§1257(2) as the basis for its appeal to this Court. See *Prune Yard Shopping Center vs. Robins,* U.S. , 100 S.Ct. 2035, at 2039-2040 (1980). What Princeton does not address in its statement is the right of a private party to appeal in a criminal case where the State itself does not choose to challenge the overturning of a conviction. Indeed, Princeton appears to be without standing to bring this appeal to Court.

The State of New Jersey, although listed as an appellant, does not assert that provisions of its own State Constitution are unconstitutional, as does Princeton. In the Notice of Appeal filed with the New Jersey Supreme Court, see Princeton's Brief, p. 72a, the State of New Jersey states only "that the questions raised by the University are substantial and should be fully litigated." But the state nowhere has said that the case was wrongly decided by the New Jersey Supreme Court.

Moreover, it should be pointed out that the position of the State of New Jersey and of Princeton University were notably different at the oral argument before the Supreme Court of New Jersey. In substantial measure the State was closer in its argument to that of Appellee Schmid than to the University's for both of the former were arguing in behalf of "balancing" tests, though they differed on the application of the test to the instant case. The University, on the other hand, made the absolutist argument reflected in its Brief to this Court. That argument was rejected not only by the Supreme Court of New Jersey, but also by its own co-appellant. There is thus no warrant whatsoever for believing that the State of New Jersey has adopted Princeton's theory of its extent of protection under the First Amendment, and there is every reason to think that the State has not, unless its position has changed since the oral argument.

The reality of this case is that a private party, Princeton University, is asking this Court to order New Jersey to invoke its criminal process in a situation where the State is not overtly claiming authority to do so (and has been told by its highest Court that it is without such authority). There appears to be no precedent for a private party's being allowed to appeal to this Court in regard to the setting aside of a conviction by a State Supreme Court under

its own Constitution. The State is obviously free to lodge such an appeal, but they have not genuinely done so in the instant case. As Princeton University is without standing, this Court is without jurisdiction and should dismiss the instant appeal.

B. (1) THE STATES ARE FREE TO PROTECT INDIVIDUAL LIBERTIES EVEN WHERE THE FIRST AMENDMENT ARGUABLY DOES NOT, AND THE NEW JERSEY SUPREME COURT'S CONSTRUCTION OF ITS OWN CONSTITUTION TO DO SO SHOULD BE SUMMARILY AFFIRMED

In the majority opinion in *Prune Yard Shopping Center vs. Robins*, supra, Mr. Justice Rehnquist emphasized "the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constition." 100 S.Ct., at 2040. See also United States Constitution, Amendment 10. That is precisely what the New Jersey Supreme Court did in the instant case, correctly determining that the right of free flow of political information asserted by Appellee was so fundamental that, regardless of its possible lack of protection by the First Amendment of the United States Constitution, it was protected by the New Jersey Constitution, Article 1, paragraph 6 and 18.

This case is therefore controlled by *Robins*, and the decision of the New Jersey Supreme Court is a fit candidate for summary affirmance.

B. (2) PRINCETON UNIVERSITY'S ARGUMENT IN REGARD TO ITS RIGHT OF "ACADEMIC FREEDOM" UNDER THE FIRST AMENDMENT IS FRIVOLOUS AND DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION.

Princeton University correctly notes that academic freedom is "a special concern of the First Amendment," Brief, p.7, quoting *Univeresity of California Regents vs. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J.). What the University does not do is recognize the context within which academic freedom has been placed. Indeed, Justice Powell himself focused on the freedom of a university to make its own judgment as to . . . the selection of its student body," *id.* an issue absent from this case. He went on to quote the passage from Justice Frankfurter's concurrence in *Sweezy vs. New*

Hampshire, 354 U.S. 234, 263 (1957) that is itself quoted by Princeton in its Brief, p. 8 ft. 5:

> "It is the business of a university to promote that atmosphere which is most *conducive to speculation, experiment and creation.* It is an atmosphere in which there prevail 'the four essential freedoms' of a university — to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." (emphasis added)

To put it mildly, Appellee Schmid does not in any manner whatsoever challenge Princeton University's rights in regard to these "four essential freedoms." Princeton remains, even after *State vs. Schmid*, fully in control of its admission process, faculty hiring and methods of instruction, and its curriculum. What Princeton is asserting has nothing to do with academic freedom properly defined in terms of "speculation, experiment and creation." Instead the University is asserting its right to become an enclave of totalitarianism, in which the officials of Princeton University are to be granted the right, to be exercised solely at its discretion, to control *all* of the presentation of ideas to its student body, whether in the classroom or outside of it.[1] In an example of Orwellian newspeak, the previous rights of academic freedom are transformed into the right of "indoctrination in virtually any set of beliefs" espoused by University officials, Princeton Brief, p. 7. This is a shocking argument in its own terms. What makes it truly dangerous is that Princeton wholly avoids recognition of the fact, see Stipulated Fact I, Princeton Brief, p. 54a, that its students are not *only* "its" students, but also, the overwhelming majority of them, citizens of the United States and its States who participate as voting members of the wider polity. Princeton's assertion of its right to indoctrinate — and, concomitantly, to exclude persons like appellee from access to the student-citizens who live on the Princeton campus — represents a thoroughgoing attack on the

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1. The barrenness of Princeton's academic freedom argument is exposed by its reliance on its status as a *private* university. But to the extent that academic freedom is protected at all by the First Amendment, it is clear that a *public* university would most easily come within its ambit. It simply cannot be the case that Princeton has academic freedom rights that Rutgers does not have. It may have other rights not enjoyed by Rutgers but added protection of academic freedom cannot be one of them.

free examination of ideas that is central not only to academic freedom but to the very idea of the republican form of government articulated by Article IV of the United States Constitution as the *sine qua non* of the American system of self-government.

Princeton's argument is frivolous and unworthy of a great university.

IV. CONCLUSIONS

For each of the reasons set forth above, this Court should summarily affirm the opinion and judgment of the Court below, or dismiss the appeal for failure to present a substantial federal question or for lack of standing of the appellant.

Respectfuly submitted,

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